IN THE

Supreme Court of the United States

No. 78-1860

BRANDON H. LEAVITT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

SELIG I. GOLDIN
Goldin & Cates
Post Office Box 1251
Gainesville, Florida 32602
(904) 378-1673

Attorneys for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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PETITION FOR WRIT OF CERTIORARI

Petitioner, BRANDON H. LEAVITT, prays that a Writ of Certiorari be issued to review the Judgment of the District Court of Appeal, First District of Florida, entered on 17 April 1979, Rehearing denied 15 May 1979. (Said Judgment and Order is incorporated as Appendix "A").

The Circuit Court, Eighth Judicial Circuit, in and for Alachua County, Florida, entered a Judgment on the 7th day of August 1978, sentencing Petitioner to 5 years probation with an adjudication of guilt withheld for possession of cocaine. As a special condition of probation, Petitioner was required to serve 1 year in

custody. Petitioner was also placed upon a concurrent probation with an adjudication of guilt withheld for a period of 3 years for possession of more than 5 grams of cannabis. (Said Judgment is incorporated as Appendix "B").

The District Court of Appeal, First District, rendered its decision and opinion wherein it affirmed the Judgment as to the cocaine offense; however, the Judgment as to the cannabis offense was reversed and the cause remanded for further disposition on the lesser included misdemeanor offense of possession of less than 5 grams of cannabis. This decision is not yet reported in the Southern Reporter System. (This opinion is incorporated as Appendix "A").

Under the Florida appellate system, this decision is a Judgment of last resort in the State of Florida.

The stage of the proceedings in which the Federal question sought to be reviewed was first raised were: (1) in the Trial Court by pre-trial Motion to Suppress Evidence; and (2) at the Appellate level, First District Court of Appeal, by Point One of Petitioner's Brief.

Thereafter, Petitioner filed his request for a Stay pending disposition of this Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under Section 1257(3), Title 28, U.S.C.

QUESTION PRESENTED

The Federal Question raised in this Petition is:

WHETHER AN INDIVIDUAL WHO SUBMITS HIMSELF FOR PREBOARDING INSPECTION PURSUANT TO FEDERAL ANTI-HIJACKING PROCEDURES AT AN AIRPORT CAN WITHDRAW AND WITHDRAW CONSENT TO A SEARCH OF CARRY ON PERSONALTY.

CONSTITUTIONAL PROVISION INVOLVED

This case presents questions concerning the construction and interpretation of the 4th and 14th Amendments to the United States Constitution, which provide:

4th: "The right of the people to be secure in their persons, * * * effects, against unreasonable searches and seizures, shall not be violated * * * *."

14th: "* * * nor shall any state deprive any person of life, liberty, or property, without due process of law. * * * *"

STATEMENT

Petitioner was arrested and charged with a number of offenses on 8 December 1977. After various Informations were filed, a pre-trial Motion to Suppress Evidence was filed alleging that the search of Petitioner at the Gainesville, Florida Airport during a preboarding screening procedure was illegal. This Motion was denied and the trial of this cause began before a jury on 25 May 1978. The jury found Petitioner guilty of

possession of cocaine and possession of more than 5 grams of cannabis.

Petitioner's Motion for New Trial was denied and the District Court of Appeal, First District of Florida, heard the appeal as stated herein.

The events, sufficient for an understanding of the facts leading to Petitioner's conviction, are as follows:

On 8 December 1977 at the Gainesville, Florida Airport, Petitioner began to go through the pre-boarding screening process as he prepared to board a flight. When a carry-on bag went through the X-Ray machine, the attendant noticed that there was an object she could not identify. The attendant testified that Petitioner pushed the bag toward her for inspection and while the inspection was in progress, he changed his mind. Another attendant confirmed that Petitioner did not want to complete the inspection process and that the first attendant gave Petitioner an option to leave the inspection area. Petitioner testified that he did not consent to a search of his bag. As he left the inspection area, he left a toilet kit which the first attendant handed to a nearby police officer. She stated that she did not see any controlled substance in the toilet kit. The police officer testified that the toilet kit was open and he saw cannabis and a white powder inside of it.

The police officer chased Petitioner and, after shooting him in the foot, Petitioner was placed under arrest and this prosecution ensued.

SUMMARY OF ARGUMENT

If an individual has the right to withdraw from a pre-boarding screening area of an airport, he also has the right to object to a search of his personal property. The attendant continued her search after the consent was withdrawn and it is therefore Petitioner's position that the search and subsequent seizure was violative of constitutional limitations.

ARGUMENT

In recent years, this Country, as well as the rest of the world, has been plagued by a new criminal element comprised of individuals who hijack commercial aircraft. Because of the great danger to the innocent passengers and airline personnel from armed wackos, it has become necessary to search all passengers for weapons. As a result, the passenger boarding an airliner has now been asked to submit to a search and, as would be expected, these searches have uncovered numerous folks carrying all types of illegal substances which are not weapons. Thus, a whole new body of law is evolving concerning airport searches. It is not Petitioner's purpose to contest the validity or rationale of these procedures; rather, Petitioner will attempt to demonstrate to this Court that within the parameters of the applicable law, the search of Petitioner was an illegal act.

In the context of this case, the Petitioner was not considered as a risk because of any actions on his part before he began the screening process and the X-Ray

machine, sometimes called a magnetometer, could not be utilized to identify an object in his carry-on bag. Under similar factual situations, two results have emerged from the Federal Court system. On one side is the rule of the United States Court of Appeals, Fifth Circuit, which is personified by the decision in *United States v. Skipwith,* 482 F.2d 1272 (1973). In this case, the Defendant presented himself for boarding and the ticket agent detained him since he fit an anti-skyjack profile. He was searched and a controlled substance was found. The Court first noted that:

> "... Rather, Skipwith came to the specific part of the airport where he knew or should have known all citizens were subject to being searched."

The Court then stated the rule as:

> "... we hold that those who actually present themselves for boarding on an air carrier, like those seeking entrance into the country, are subject to a search based on mere or unsupported suspicion."

This is in line with the holdings of the United States Court of Appeals, Second Circuit, in *United States v. Edwards,* 498 F.2d 496 (1974), and *United States v. Williams,* 516 F.2d 11 (1975) that:

> "... we hold that there was implied consent to search the carry-on baggage by virtue of the fact that baggage which one does not want to have searched may be consigned to the baggage compartment."

The effect of this line of cases is that once this implied consent is given by the act of entering a boarding area, any suspicious act, whether in person or an unidentified object while baggage is going through a

magnetometer, justifies a search and consent can not be withdrawn at that point.

The other rule that emerged first was enunciated in *United States v. Meulener,* 351 F. Supp. 1284 (C.D. Cal., 1972), in which the search of a passenger's suitcase was held invalid because the passenger was not given the option to decline a search upon the condition that he not board the aircraft.

In *United States v. Davis,* 482 F.2d 893 (1973), the United States Court of Appeals, Ninth Circuit, had an opportunity to review this issue. As Davis approached the loading gate, he was told that a routine security check was necessary and the agent reached for Davis' briefcase, opened it, found a gun and he was taken into custody. In reviewing the applicable law, the Court stated:

> "... searches conducted as a part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of crime, may be permissible under the Fourth Amendment though not supported by a showing of probable cause directed to a particular place or person to be searched."

The Court then held:

> "In sum, airport screening searches of the persons and immediate possessions of potential passengers for weapons and explosives are reasonable under the Fourth Amendment *provided each prospective boarder retains the right to leave rather than submit to the search.*" (Emphasis Added).

The United States Court of Appeals, Sixth Circuit, in 1974, approved this rule in *United States v. Dalpiaz,* 494 F.2d 374, although this was not necessary for the

determination of that case. However, in *United States v. Freeland*, 562 F.2d 383 (1977), the Ninth Circuit expressly approved the rule when it held such a search valid so long as the passenger had a right to withdraw luggage and not board the airplane.

From a purely factual standpoint, the closest decision to the case at bar is *United States v. Homburg*, 546 F.2d 1350 (C.C.A. 9th, 1977). The facts were summarized by the Court as:

> "On September 16, 1975, appellant passed through security inspection at Western Airlines Gate One at San Diego International Airport. His carry-on suitcase was subjected to x-ray inspection and he went through the magnetometer. Just prior to his arrival at the inspection point, security officers there were notified that an anonymous bomb threat had been received at the airport.
>
> As appellant passed through the inspection point, security officers observed a rectangular bulge in the front portion of his trousers, which he awkwardly attempted to conceal with his suitcase. Appellant asked for directions to the men's room and an officer was instructed to follow him there. In the restroom, appellant went inside a toilet stall and the officer heard a 'cracking or rustling sound, like a plastic bag or something of that nature' (R.T. at 64), coming from inside the toilet stall. Appellant remained inside the stall for about fifteen minutes. When he exited, the bulge in his trousers was gone and he was carrying his suitcase normally. Appellant then took his place in the boarding line, nervously watching security officers.
>
> A security officer approached appellant and told him he would have to be reinspected before boarding the plane. Appellant complied and returned to the inspection area, but upon arrival

> indicated to the officer that he wanted to leave the boarding area. Testimony varies as to the precise words appellant used, but there is no dispute that appellant indicated that he wished to leave the boarding area and that he took a step or two in that direction before being forcibly detained. The suitcase was then opened, contraband discovered and appellant was placed under arrest."

Although the search was upheld on other grounds, the Court held as to the question involved herein that:

> "While there is authority from this circuit to support the government's view of airports generally, we cannot accept the government's argument that a passenger in a secured boarding area may not, as a general proposition, leave the area rather than submit to additional searches. Such a view runs contrary to the rationale of United States v. Davis, 482 F.2d 893 (9th Cir. 1973). In that case, we held that the justification for warrantless screening searches is the implied consent of the passenger. '(A)s a matter of constitutional law, we stated in Davis, 'a prospective passenger has a choice: he may submit to a search of his person and immediate possessions as a condition to boarding; or he may turn around and leave.' 482 F.2d at 913. Davis does not state specifically that the consent to additional searches after a preliminary screening may be revoked if a passenger agrees not to board the plane. The above-quoted portion of Davis strongly indicates, however, that a party may revoke his consent to be searched any time prior to boarding the plane, even when he has passed beyond the initial screening point, if he agrees to leave the boarding area. Other decisions of this court have also recognized that a passenger always maintains the option of leaving. See, e.g.,

> United States v. Miner, 484 F.2d 1075 (9th Cir. 1973); United States v. Moore, 483 F.2d 1361 (9th Cir. 1973). We must therefore reject the government's view of its power to search within the boarding area as too sweeping. Since the undisputed evidence indicates that appellant wished to leave the boarding area, the trial judge erred in finding the search reasonable under the general doctrine of implied consent."

The search was, however, upheld because of suspicious conduct, a bulge in the pants (gone after a trip to the restroom) and a bomb threat that had been received.

In this case, none of these additional factors are involved. The attendant began to search without telling or affording Petitioner an opportunity to leave. However, Petitioner did protest (which was verified by the other attendant) and object but the first attendant kept on searching.

As has been noted in the various federal cases cited herein, two factors are obvious. The first is that hijackings are way down and, secondly, most items found at airport searches are not bombs or guns but controlled substances. As hijacking has become less of a frequent problem, we must ever keep in mind that Courts must be ever zealous in guarding against further invasions of personal liberties and rights merely because we are all in agreement that the consequences of a skyjacking can mean death to a large number of innocent people.

Accordingly, Petitioner submits that on balance the better view is to allow airport routine screening upon the basis of consent so long as a passenger also retains the right to give up his flight by revoking the consent and leaving. There is just no evidence that this rule

encourages efforts to skyjack or that it increases weapons at the airport. Based on this rule, the facts of this case indicate that there was no consent and that the search of Petitioner's carry-on bag was illegal which vitiates his arrest and any subsequent statements or searches incident to arrest.

Accordingly, Petitioner submits that the better view is that an individual may revoke consent and withdraw and, therefore, the State of Florida has violated his rights under the 4th and 14th Amendments to the Constitution of the United States.

CONCLUSION

Accordingly, probable jurisdiction should be noted in this case.

Respectfully submitted,

/s/ Selig I. Goldin
Selig I. Goldin
GOLDIN & CATES
Post Office Box 1251
Gainesville, Florida 32602
(904) 378-1673

Attorneys for Petitioner

CERTIFICATE OF ATTORNEY

I, SELIG I. GOLDIN, hereby certify that I am a member of the Bar of the United States Supreme Court in good standing and was admitted to practice by the Court on 17 September 1973.

/s/ Selig I. Goldin
Selig I. Goldin, Attorney At Law

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original copy hereof has been furnished this 14th day of June 1979 to: THE HONORABLE MICHAEL RODAK, JR., Clerk, United States Supreme Court, Washington, D.C., and copies to: THE HONORABLE RAYMOND E. RHODES, Clerk, District Court of Appeal, First District of Florida, Post Office Box 487, Tallahassee, Florida 32304; THE HONORABLE JIM SMITH, Attorney General for the State of Florida, The Capitol, Tallahassee, Florida 32304; and to THE HONORABLE A. CURTIS POWERS, Clerk of the Circuit Court, Eighth Judicial Circuit, Alachua County Courthouse, Gainesville, Florida 32601.

/s/ Selig I. Goldin
Attorney At Law

APPENDIX "A"

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND DISPOSITION THEREOF IF FILED.

CASE NO. LL-25

BRANDON H. LEAVITT,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

Opinion filed April 17, 1979.

An Appeal from the Circuit Court for Alachua County. John J. Crews, Judge.

Selig I. Goldin, of Goldin & Cates, for Appellant.

Jim Smith, Attorney General; and Lee Mandell, Assistant Attorney General, for Appellee.

PER CURIAM.

This is an appeal from the Circuit Court in and for Alachua County. The appellant appeals a final order withholding adjudication of guilt a placing him on probation with a special condition of one year in jail and payment of $2,500 costs on a cocaine possession count based upon a jury verdict finding him guilty of

possession of cocaine under Count Two of one information, and guilty of possession of more than five grams of cannabis under a second information. The two cases had been consolidated and were tried together.

Prior to trial motions to suppress were filed by appellant in each case and were denied. A motion for judgment of acquittal under Count Two of the second information which charged unlawful possession of drug paraphernalia was granted by the court.

At the trial the following facts developed: In 1977 the appellant attempted to board an airplane in the Gainesville airport. Before being allowed to board, appellant was required to submit himself and his carry-on baggage through a predeparture screener. The agent handling the machine could not identify an object in his carry-on bag so she asked appellant for permission to examine his bag in his presence. The agent testified that defendant consented and pushed his bag toward her and then both proceeded to search going toward the unindentified object. However defendant testified he did not consent to the search. Elsa Powers, a prescreening inspector testified on deposition that defendant did not want to be checked. Upon the agent grasping a toilet kit, the appellant grabbed his bag and proceeded to leave the area. The agent was left holding the toilet kit, which had come open in the process. She then handed the kit to Officer Sanders of the Gainesville Police Department who looked inside and saw five or six bags of marijuana. Under these bags he also saw a white powder and he began chasing appellant. Sanders yelled at appellant to stop, that he was under arrest, but appellant continued to flee, whereupon Sanders shot appellant in the foot.

Appellant was arrested and taken to the hospital. The total weight of the cannabis taken from appellant was 47.2 grams gross weight which included seeds, stems and certain sticks.

An amended information was filed charging in Count One possession of cocaine with intent to sell or deliver and charging in Count Two simple possession of cocaine. In a separate case, an information was filed charging appellant with possession of more than five grams of cannabis and with possession of drug paraphernalia.

At trial, a state chemist testified that the substance was cannabis and that it weighed 47.2 grams. He also testified that based upon his tests, the white powder was illegal cocaine. Dr. Robert Shapiro, an expert in the field of analysis of organic compounds, testified for appellant that there are eight isomers of cocaine and that it would not be possible to distinguish between the isomers based upon the tests that the state chemist used, and that in order to prove that the cocaine involved in a criminal case is the cocaine made illegal by statute, additional tests must be performed. Thus a conflict was presented to the jury on the issue of the character of the substance in question. The jury having resolved such conflict in favor of the State and against the appellant, it is not the province of this court to act as a second jury on this issue. We therefore find point three to be without merit for the evidence demonstrated that the illegal cocaine was a controlled substance within the definition of that term as proscribed by section 893.03 (2) (a)4.

Appellant contends that the trial court erred in denying motions to suppress the evidence which

revealed both the cocaine and cannabis, alleging that the search was unreasonable. We hold that the denial of such motions was not error. In so holding we determine that the airport screening employees conducted a proper search pursuant to appellant's consent and that the evidence affirms that the search was reasonable under the circumstances. *United States v. Cyzewski*, 484 F.2d 509 (5th Cir. 1973). Therefore the judgment of conviction of unlawful possession of cocaine under Count Two of the information is affirmed.

We reverse the order of probation with reference to the cannabis count of the information for the reason that it was not proven beyond and to the exclusion of every reasonable doubt that the appellant was guilty of the possession of more than five grams of cannabis, and we remand such order to the trial court with direction to reduce the probation sentence commensurate with a misdemeanor charge of possession of less than five grams of cannabis. See *Purifoy v. State*, 359 So.2d 446 (Fla. 1978).

Affirmed in part and reversed in part and remanded to the trial court for the purpose hereinbefore indicated.

MILLS, Acting Chief Judge and MASON, ERNEST E., Associate Judge, CONCUR. ERVIN J., CONCURS IN PART and DISSENTS IN PART.

ERVIN, J., Concurring in part and Dissenting in part.

I concur in all portions of the majority's opinion with the exception of that holding it was not proven beyond a reasonable doubt that appellant was guilty of

possession of more than five grams of cannabis. I feel the facts here, as in *Dorsey v. State*, ____ So.2d ____, no. KK-240 (Fla. 1st DCA, February 9, 1979), are sufficiently distinguishable from those which existed in *Purifoy v. State*, 359 So.2d 446 (Fla. 1978). I would affirm the order of probation in its entirety.

APPENDIX "B"

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CASE NO. LL-25

BRANDON H. LEAVITT,

Appellant,

—vs—

STATE OF FLORIDA,

Appellee.

ORDER

Motion For Rehearing And/Or Clarification and Application For Stay Of Mandate thereto having been considered,

IT IS ORDERED that the Motion is hereby denied.

IT IS FURTHER ORDERED that the Application is denied.

By Order of the Court dated this 15th day of May, A.D. 1979. Unless otherwise ordered, the Court's mandate will issue fifteen (15) days after this date. Florida Rules of Appellate Procedure, 9.340; General Order entered April 14, 1978. Acting Chief Judge E. R. Mills, Jr., Judge Richard W. Ervin, III, and Associate Judge Ernest E. Mason.

A TRUE COPY
ATTEST:
RAYMOND E. RHODES, CLERK

/s/ Raymond E. Rhodes
District Court of Appeal, First District
Tallahassee, Florida

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APPENDIX "B"

Book # XX Page # [illegible]

ORDER WITHHOLDING ADJUDICATION OF GUILT AND PLACING DEFENDANT ON [illegible]

STATE OF FLORIDA, Plaintiff — vs. — BRANDON H. LEAVITT, Defendant

In the CIRCUIT Court of ALACHUA County, Florida

Case No. 77-2508-CF

This cause coming on this day to be heard before me, and you, the defendant, BRANDON H. LEAVITT, being now present before me, and you having:

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXX
[illegible] FOUND GUILTY BY THE VERDICT OF A JURY OF
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

[illegible] of UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE, TO-WIT: COCAINE, AS CHARGED IN COUNT II OF THE INFORMATION

It [illegible] to the [illegible] of the Court that you are not likely again to engage in a criminal course of conduct, and that the ends of justice and the welfare of society do not require that you should presently be adjudged guilty and suffer the [illegible] by law;

Now, therefore, it is ordered and adjudged that the adjudication of guilt and imposition of sentence are hereby withheld, and that you are hereby placed on probation for a period of FIVE YEARS under the supervision of the [illegible] of XXXXXXXXXXXXX CORRECTIONS and its officers, such supervision to be subject to the provisions of the laws of [illegible].

It is further ordered that you shall comply with the following conditions of probation:

(1) [illegible] the [illegible] day of each month, you will make a full and truthful report to your Probation [illegible] for that purpose.
(2) [illegible] the amount of Ten Dollars ($10) per month toward the cost of [illegible] waived in compliance with Florida Statutes.
(3) [illegible] or employment or leave the county of your residence without first [illegible] of your Probation Officer.
(4) ~~You [illegible] weapons or [illegible] without [illegible] the consent of your Probation Officer.~~ [illegible]
(5) You will live and remain at liberty without violating any law. A conviction in a court of law shall not be necessary in order for such a violation to constitute a violation of your probation.
(6) You will not use intoxicants to excess; nor will you visit places where intoxicants, drugs or other dangerous substances are unlawfully sold, dispensed or used unlawfully.
(7) You will work diligently at a lawful occupation and support any dependents to the best of your ability as directed by your Probation Officer.
(8) You will promptly and truthfully answer all inquiries directed to you by the Court or the Probation Officer, and allow the Officer to visit in your home, at your employment site or elsewhere, and you will comply with all instructions he may give you.
(9) Pursuant to Chapter 948, Florida Statutes, serve one year in an institution of the Department of Corrections to which said department may cause you to be confined. The Court recommends that you be incarcerated at the Indian River Correctional Center which has an innovative youthful offender program.
(10) Pay $2500 fine or costs.
(11) Report to A.C.C.C. August 28, 1978.
(12) The sheriff of Alachua County shall transport the defendant to the proper institution of Dept. of Corrections.

You are hereby placed on notice that the Court may at any time rescind or modify any of the conditions of your probation, or may extend the period of probation as authorized by law, or may discharge you from further supervision; and that if you violate any of the conditions of your probation, you may be arrested and the Court may revoke your probation, adjudge you guilty and impose any sentence which it might have imposed before placing you on probation.

[illegible] you have reported to the Probation Officer and have been instructed as to the conditions of probation, you shall be released from custody if you are in custody and if you are at liberty on bond, the surety thereon shall stand discharged from liability.

It is further ordered That the Clerk of this Court file this order in his office, record the same in the Minutes of the Court, and forthwith provide certified copies of same to the Probation Officer for his use in compliance with the requirements of law.

DONE AND ORDERED IN OPEN COURT, this the 7th day of AUGUST, 1978.

John J. Crews

Judge

I acknowledge receipt of a certified copy of this order and that the conditions have been explained to me.

Date: _____

Instructed by: _____

_____
Probationer

Original: Court
Copies: Probationer
File

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Rev. 12/76